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STATEMENT OF INTEREST OF AMICUS CURIAE

The Council on Religious Freedom ("CRF") is a national nonprofit organization which was formed to uphold and promote the principles of religious liberty. Its Board of Directors is composed of individuals who are active in religious affairs, some in an official capacity and some on a lay basis. Council on Religious Freedom has as one of its major interests the relationship of free exercise principles to non-establishment concerns with the view of maximizing religious freedom.

Many of the members of CRF have children enrolled in church-operated schools and are concerned that those schools continue as distinctive sectarian ministries of their church. Also, several members of the CRF Board have served on the governing boards of religious educational institutions and appreciate the need for those institutions to be free to convey their religious ideals within those school walls and to integrate the sponsoring church's religious values with education.

Pursuant to Rule 37.3, the letters from the parties consenting to the filing of this brief are being filed simultaneously with this brief.

INTRODUCTION

The Council on Religious Freedom is troubled by the assertion made in this case by parents who have elected to enroll their child in a pervasively sectarian school and now argue that the free exercise and equal protection provisions of the Constitution mandate the placement of a public school employee on the campus of a church-operated school. This is of particular concern since most sectarian schools necessarily insist on the right to select and maintain both students and staff in accordance with religiously-based policies and standards. Amicus believes that the impact of this Court's decision may be much greater than

only the determination of constitutional uses of tax moneys.

This is not a case where taxpayers have challenged a school district's decision to place a deaf child in a private school and to provide assistance in the form of an interpreter. Rather, this suit involves a civil action initiated by a parent under the EHA, 20 U.S.C. § 1415(e), seeking an injunction requiring the school district to provide on-premises services for a deaf student placed by parents in a private school. Here, the school district petitioned the Pima County, Arizona, Attorney for an opinion on the constitutionality of providing such services under both the federal and state Constitutions. The Deputy County Attorney subsequently advised that furnishing an interpreter would offend constitutional prohibitions contained in both the federal and state constitutional charters.

Petitioners readily admit that the parochial high school in which the Zobrests enrolled their child is a pervasively religious institution that holds and encourages daily worship services and emphasizes religious values (Petitioners' Brf. at 3, 10). Petitioners acknowledge that the district court "was correct in saying that religion pervades the Salpointe curriculum" and "[t]hat the interpreter conveys religious messages is a given in the case." (*Id.*)

In fact, in reviewing the class and school curriculum in which the interpreter would be required to participate, the court of appeals stated:

> Were we to sanction the aid the Zobrests seek, a public employee would be at James Zobrest's side in each of his classes at a sectarian school. With James, the employee would attend religion classes, the nominally "secular" subjects in which as the parties stipulate, Salpointe faculty are encouraged to "assist students in experiencing how the presence of God is manifest," and the masses at which Salpointe encourages attendance. The interpreter would be the instrumentality conveying the religious message and experience.

963 F.2d 1190, 1194 (9th Cir. 1992). Thus, the particular question before this Court concerns whether a school district can be forced to provide a school district employee (whose services are being paid with tax-derived funds) to work full-time within the confines of a pervasively religious institution for the express purpose of transmitting and translating secular and sectarian teachings and assisting a student in the church's liturgies. It was admitted that the reason why petitioners elected to send their son to Salpointe Catholic High School was religious (Petitioners' Brf. at 3).

There is no apparent claim by petitioners that their child would not have received a full and complete free appropriate public education, together with a certified sign language interpreter, at a public school site. In fact, the record shows that at the junior high school level, the school district furnished the student a mainstream program on public school premises together with resource room assistance, speech/language therapy, and an interpreter for all classes (Petitioners' Brf. at 3 n.1).

Petitioners have admitted that the school district has "continued James in its special education system, providing,pursuant to the EHA, speech therapy services twice weekly to him on public school premises, transportation related thereto, and continuing annually to update his IEP." (Petitioners' Brf. at 6). Thus, EHA services were not denied this student because of his religion. Only the location and necessary nature of those services were specifically tailored to accommodate the student because of the potential constitutional defects inherent in a program provided on sectarian school premises.[1]

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[1] Amici Christian Legal Society devotes a large portion of its brief erroneously arguing that at least 30 years of this Court's judicial prec-

SUMMARY OF ARGUMENTS

The decision of the court of appeals in this case should be affirmed under this Court's precedents decided under the Establishment and Free Exercise Clauses of the First Amendment. The aid program demanded by petitioners violates the Establishment Clause because it would use tax moneys to hire a public employee who would become the conduit through which a pervasively sectarian school indoctrinates a student in its particular religious faith and through which the student participates in worship services. Under both Religion Clauses, the proposed aid program raises the serious question of whether a pervasively sectarian school will be able to maintain its autonomy by demanding that a state employee observe the school's religiously based rules of conduct while functioning on the religious campus.

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edent must now be scrapped because the Establishment Clause, as interpreted by the court of appeals, required that the state deny services because of the student's religion. If, in fact, the school district had withheld services because the student was a member of the Roman Catholic faith, that clearly would be unconstitutional. However, the school district did *not* refuse or withhold services. The school district did in fact provide services to the student on the premises of the public school. However, the school district *could not* constitutionally provide the services, as requested, within the confines of an admittedly pervasively sectarian institution.

ARGUMENTS

I. Under its precedents decided under the Establishment Clause of the First Amendment, this Court should affirm the court of appeals decision in this case because the aid program demanded by petitioners involves the use of tax moneys to hire a public employee who would become the conduit through which a pervasively sectarian school indoctrinates a student in its particular religious faith and through which the student participates in worship services.

Petitioners argue that the school district's concern under both the federal constitutional no-establishment prohibition and the state constitutional proscription[2] should be ignored because of petitioners' free exercise and equal protection claims (*id.* at 7). It is not the task of the judiciary alone to determine when constitutional boundaries have been crossed. It is also the responsibility of other branches and agencies of government. School district officials too take an oath to uphold the Constitution and are required to operate within its mandates. Certainly, in this situation the public school officials, who were most directly involved in administering the program and who were sensitive enough to the constitutional concern to raise the question with the local legal authority, should not be carelessly second guessed.

In *Brusca v. State Bd. of Educ.*, 405 U.S. 1050 (1972), this Court affirmed a decision holding that exclusion of parochial schools from tax funding of education did not violate the constitutional rights of parents sending their children to such schools.

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[2] Article 2, section 12, of the Arizona Constitution states in part: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment."

In *Norwood v. Harrison*, 413 U.S. 455 (1973), the State of Mississippi purchased textbooks and lent them to students in both public and private schools without reference to whether any participating private school had racially discriminatory policies. This court concluded that while private schools have a right to exist and operate, the state is not required by the Equal Protection Clause to provide assistance to private schools equivalent to that which it provides to public schools. Chief Justice Burger found in *Norwood*:

> Even as to church-sponsored schools, whose policies are nondiscriminatory, any absolute right to equal aid was negated, at least by implication, in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Religion Clauses of the First Amendment strictly confine state aid to sectarian education. Even assuming, therefore, that the Equal Protection Clause might require state aid to be granted to private nonsectarian schools in some circumstances—health care or textbooks, for example—a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance.

Id. at 462.

Subsequently, the Supreme Court affirmed a similar determination made on appeal from the United States District Court for the Western District of Missouri in *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974). In that case the State of Missouri provided bus transportation to public school children but refused to do so for certain private school children. A Missouri taxpayer, who sent his children to a parochial school in accordance with his religious conscience, brought a lawsuit claiming that the denial of bus transportation to parochial school students violated his and

his children's due process, equal protection, and free exercise rights.

Relying on the state constitutional prohibition against aid to religion determined to be stricter than the Establishment Clause of the United States's Constitution, the district court rejected the taxpayer's claim. The court concluded that the Missouri program of excluding private school children from the transportation service was in pursuit of a valid state interest in "maintaining a very high wall between church and state." *Id.* at 383. In so doing, the court rejected the parent's equal protection and free exercise claims.

On appeal, Justice White and former Chief Justice Burger were the only two to dissent and would have noted probable jurisdiction and set the case for oral argument. However, Justice White did so by noting that in *Everson v. Board of Educ.*, 330 U.S. 1 (1947), the Court found that providing reimbursement to parents for the transportation of their children to and from school "does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Luetkemeyer*, 419 U.S. at 889. Justice White stated "[c]learly this Court viewed the program of bus transportation as a service 'so separate and so indisputably marked off from the religious function . . . ' that it could not be considered aid to religious schools in violation of the Establishment Clause." *Id.*

Nevertheless, Justice White did acknowledge that "[t]he enforcement of church-state separation could in many instances be a valid state interest—but after *Everson* it would be difficult to assert that refusal to extend busing to parochial-school children, without more, furthers a legitimate state interest in avoiding church-state entanglements." *Id.* at 890. Justice White implies that he would be deferential to state concerns on an equal protection challenge where the state asserts "a valid interest supporting the different

treatment accorded public-school and parochial school students."

In this case it is critical to note that the constitutional question does not involve the facial validity of a federal or a state statute. Instead, it involves the administration by a school district of a program of aid to handicapped children. This Court in *Bowen v. Kendrick*, 487 U.S. 589 (1988), noted the importance of the distinction between a "facial" and "as applied" analysis when reviewing a case involving no-Establishment Clause concerns. *Bowen* involved both types of challenges. In *Bowen* this Court stated:

> In several cases we have expressly recognized that an otherwise valid statute authorizing grants might be challenged on the grounds that the award of a grant in a particular case would be impermissible.

Id. at 601. Justice O'Connor in her concurrence in *Bowen* observed that "*any* use of public funds to promote religious doctrines violates the Establishment Clause." *Id.* at 623 (emphasis in original).

Whether the aid either directly or indirectly flows to a pervasively religious institution is not the only question which must be addressed. This Court must determine whether the school district would thereby be involved in assisting a sectarian institution and religious worship. Here, a governmental entity would be required to hire or contract with an individual for the avowed purpose of providing direct religious training and indoctrination.

Petitioners, citing *Widmar v. Vincent*, 452 U.S. 263, 274 (1981), argue that the "provision of benefits to so broad a spectrum of groups is an important index of secular effect." (Petitioners' Brf. at 16). The district court, however, properly observed that "[t]o identify 'primary effect,' we narrow our focus from the statute as a whole

to the only transaction presently before us," citing *Hunt v. McNair*, 413 U.S. 734, 742 (1973).

In fact, *Bowen* utilized just such an analysis in addressing the facial attack on the Adolescent Family Life Act. There, this Court clearly looked at the breadth of potential recipients under the program when addressing the facial validity issue. For instance, when discussing the "effects" prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court, citing *Mueller v. Allen*, 463 U.S. 388 (1983), stated that "the more difficult question is whether the primary effect *of the challenged statute* is impermissible." *Bowen*, 487 U.S. at 604 (emphasis supplied). The Court thereafter observed that a broad range of organizations were potential recipients. *Id.* at 608.

Even then the Court was cautious to observe that "even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion." *Id.* at 609. The Court then noted that "[o]ne way in which direct government aid might have the effect is if the aid flows to institutions that are 'pervasively sectarian.' " *Id.* at 610. The Court, however, concluded that "nothing on the face of the AFLA indicates that a significant proportion of the federal funds will be disbursed to 'pervasively sectarian' institutions." *Id.* at 610.

That, however, did not end the inquiry in *Bowen*. After finding that because the range of potential recipients was broad and because there was no indication that a significant proportion of the federal funds would be disbursed to pervasively sectarian institutions, this Court narrowed its focus to look at the question of whether the statute was unconstitutional as applied. It first determined whether those challenging the statute had standing. *Id.* at 618-19. But it then directed the district court on remand to consider whether the aid had been used to fund *specific* re-

ligious activities. *Id.* at 621. Without question, the breadth of the potential recipients becomes completely irrelevant if the Court finds that a specifically challenged expenditure will be used to directly advance or enhance a religious activity or to provide public funds to promote religious doctrines.

Petitioners argue that "[t]he service of the interpreter for James at Salpointe produced *multiple* effects, most of those being identical to the secular effects produced in public schools." (Petitioners' Brf. at 10). According to petitioners, "if the word 'primary' is to have any meaning, one out of many effects of particular governmental action may not automatically be held 'primary' simply because it is religious." (*Id.* at 9).

Despite the fact that the courts have used the words "principal" or "primary effect," as used in *Lemon*, 403 U.S. at 612, there is no requirement that the Court determine whether some permissible effect is the "primary" effect of the statute. Rather, unless the unconstitutional effect is "remote or incidental," the Establishment Clause is violated. *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 784, n.39 (1973), quoting *McGowan v. Maryland*, 366 U.S. 420, 450 (1961). This gloss on the primary effect test is explained by the fact that the First Amendment prohibits laws "respecting an establishment" of religion, which is noted and emphasized in *Lemon* itself.

Tilton v. Richardson, 403 U.S. 672 (1971), resolved any lingering doubt as to the scope of the effect test. As explained in *Nyquist*, 413 U.S. at 783-84 n.39:

> Any remaining question about the contours of the "effect" criterion were resolved by the Court's decision in *Tilton*, in which the plurality found that the *mere possibility* that a federally financed structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might "*in part* have the effect of advancing religion." 403 U.S. at 683.

(First emphasis supplied; second emphasis in original.)

Petitioners' "multiple" effects argument has no life whatsoever in light of this Court's "as applied" analysis in *Bowen*. Here, the school district and its legal advisors, who were required to decide whether the placement of one of its employees within the environs of a pervasively sectarian school was either constitutionally required or even permissible, were in the very best position and here clearly entitled to conclude that a primary effect of such state action would be assisting in the inculcation of religion.

Petitioners argue that this case is controlled by *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986), concluding that there is no distinction between the blind student receiving a grant for vocational education which the student determined would be used for theological training and the situation here where the school district is faced with whether to hire or contract with an individual to provide educational services on the premises of a pervasively sectarian institution. This Court in *Witters* found that the assistance provided directly to the individual under the state vocational rehabilitation services statute did not offend the Establishment Clause of the First Amendment for several reasons, not the least of which was the fact that the grant to the individual did not involve state action nor did the recipient's choosing to utilize neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion. *Id.* at 488-89.[3]

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[3] In Judge Tang's dissent below he recognized that "the money in *Witters* went first to the student and then to the school, whereas in this case the money goes from the state directly to the interpreter." 963 F.2d at 1201. But he concluded that this distinction was consti-

The *Witters* Court concluded that the arrangement was no different from that in which the state issued a paycheck to one of its employees who choose to donate all or a portion of his paycheck to a religious institution, even though the state might be aware of the fact that the employee intended to dispose of his salary in that manner. *Id.* at 486-87. This Court was careful to distinguish between a situation in which the individual was merely a conduit to funnel dollars to sectarian institutions (which would be state action) from that in which the recipient was both the technical and actual decision-maker of whether funds might ultimately be received by a religious institution. The Court further excluded from sanctioned practices an arrangement whereby aid to religion might be "properly attributable to the State." *Id.* at 489.

Equally important in the context of this case is the fact that even in *Witters* the Court refrained from ordering the state to provide the funds or services. Instead, the matter was remanded with the notation that "the state is of course free to consider the applicability of the 'far stricter' dictates of the Washington State Constitution." *Id.* at 489. The Court specifically declined "petitioner's invitation to leapfrog consideration of those issues by holding that the Free Exercise Clause *requires* Washington to extend vocational rehabilitation aid to petitioner regardless of what the State Constitution commands or further factual development reveals." *Id.* at 489. Thus, *Witters* does not require a reversal in this case.

Justice O'Connor in *Witters* found that "[n]o reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or

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tutionally irrelevant. Judge Tang, however, failed to note that the interpreter at all times is a school district employee and thus a state actor, thus not only providing the school district's symbolic presence, but also providing potential for impermissible church-state entanglement, neither of which concerns was present in *Witters*.

belief." *Witters*, 474 U.S. at 493. In neither *Mueller v. Allen*, 463 U.S. 388 (1983), nor *Witters* were governmental agencies directly involved in the educational programs. No governmental employee in either *Mueller* or *Allen* was hired and placed in sectarian school classrooms. Here, either a school district employee or an individual contracted for use by the school district would provide the services on sectarian school premises on an ongoing basis.

Petitioners also argue that this case is governed by *Board of Educ. v. Allen*, 392 U.S. 236 (1968). The legislation in *Allen* provided that local school boards were to purchase textbooks and lend them without charge to children in public or private schools. The textbooks were to be those used in any public elementary or secondary schools of the state or approved by any board of education. *Id.* at 239.

The *Allen* Court, at least in part, based its decision on its earlier finding in *Everson v. Board of Educ.*, 330 U.S. 1 (1947), involving transportation of children to and from school. *Id.* at 243. The Court observed that books were different from buses, since bus rides have no inherent religious significance, while religious books are common. *Id.* at 244. However, the Court observed that language in the New York statute involving textbooks "does not authorize the loan of religious books, and the State claims no right to distribute religious literature." *Id.* at 244. The *Allen* Court specifically noted that "only secular books may receive approval" and observed that the law was construed by the Court of Appeals of New York as "merely making available secular textbooks at the request of the individual student." *Id.* at 245. The Court further found:

> In judging the validity of the statute on this record we must proceed on the assumption that books loaned to students are books that are not unsuitable for use in the public schools because of religious content.

Id.

This Court in *Allen* further stated that a state had an interest in the secular teaching that accompanied religious training in parochial schools, *id.* at 245, and that "if the State must satisfy its interests in secular education through the instrument of private schools, it is a proper interest in the manner in which those schools perform their secular educational function." *Id.* at 247. The Court concluded that based upon the meager *Allen* record, "we cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to the students by the public are in fact instrumental in the teaching of religion." *Id.* at 248.[4]

Of course, the instant case is substantially different from *Allen*. The signing interpreter would not be relegated to school activities that are exclusively secular. Rather, it was admitted that the signer would be an instrument both in the teaching of religion and in participation in worships and other religious exercises. In using the words of the Ninth Circuit in this case, "the assistance the state would provide . . . cannot be said to be of a *clearly secular* and *separable* nature." 963 F.2d at 1196 (emphasis supplied).

In *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), this Court reviewed *Everson* and *Allen* and stated:

> In *Everson*, the Court, in a five-to-four decision, approved a program of reimbursements to parents of public as well as parochial schoolchildren for bus fares paid in connection with transportation to and from school, a program which the Court characterized as approaching the "verge" of impermissible state aid. . . . [Citation omitted] In *Allen*, decided some 20 years later, the Court upheld a New York law authorizing the provision of *secular* textbooks for all children in grades seven through 12 attending public and nonpublic schools. Finally, in *Tilton*, the Court upheld federal grants of funds for the construction of facilities to be used for clearly *secular* purposes by public and nonpublic institutions of higher learning.
>
> These cases simply recognize that sectarian schools perform secular, educational functions as well as religious functions, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian. But the channel is a narrow one, as the above cases illustrate. Of course, it is true in each case that the provision of such neutral, nonideological aid, assisting only the secular functions of sectarian schools, served indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other nonsecular areas. But an indirect and incident effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law.

Id. at 775 (emphasis in original).

Nyquist thus recognized the narrowness of the channel of permissible aid and required a determination that the financial assistance provided by government would aid only the secular functions of the sectarian school. Then, and only then, was the aid to religion considered indirect and incidental.

Like the petitioners here, the parents in *Nyquist* argued that the grants involved in New York's tuition reimburse-

[4] The majority in *Allen* noted that "the line between state neutrality to religion and state support of religion is not easy to locate." *Allen*, 392 U.S. at 242.

ment program were made to the parent and not to the sectarian school and therefore under *Everson* and *Allen* "respected the 'wall of separation' required by the Constitution." *Id.* at 781. This Court in *Nyquist*, however, stated that *Allen* and *Everson* "make clear that, far from providing a *per se* immunity from examination of the substance of the State's program, the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered." *Id.* The Court analogized the bus fare program of *Everson* to be similar to police and fire protection, sewage disposal, highways, and sidewalks for parochial schools. "Such services, provided in common to all citizens, are 'so separate and so indisputably marked off from the religious function,' . . . that they may fairly be viewed as reflections of a neutral posture towards religious institutions." *Id.* at 781-82 (citation omitted). The Court noted that the opinion in *Allen* "emphasized that upon the record in that case there was no indication that any textbooks would be provided for anything other than purely secular courses." *Id.* at 782.

In *Meek v. Pittenger*, 421 U.S. 349 (1975), this Court agreed that "as part of general legislation made available to all students, a State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities." *Id.* at 364. The Court, however, confined such permissible aid to "secular and nonideological services unrelated to the primary, religious-oriented educational function of the sectarian school." *Id.* Here the special education services are directly related to the primary religious-oriented educational function of the sectarian school.

In *Wolman v. Walter*, 433 U.S. 229, 251 (1977), this Court stated:

> The State [in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)] attempted to justify the program, as Ohio does here, on the basis that the aid flowed to the parents rather than to the church-related schools. The Court observed, however, that, unlike the bus program in *Everson v. Board of Education* . . . and the book program in *Allen*, there "has been no endeavor 'to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former.' " . . . *Lemon v. Kurtzman*, 403 U.S. at 613.

Petitioners argue, contrary to the lower court's conclusion, that the holding in *Wolman* requiring a finding that the supplying of the services was unconstitutional is really supportive of their claim. They argue that "[t]he certified sign language interpreter, selected and employed by the public authority to perform a mechanical function, severely bound by his professional Code of Ethics, and functioning *between* a teacher and a student, is nowise comparable to a religious school teacher." (Petitioners' Brf. at 20) (emphasis in original).

The *Wolman* Court, however, distinguished between diagnostic services on the one hand and teaching or counseling on the other on the basis that diagnostic services "have little or no educational content and are not closely associated with the educational mission of the nonpublic school." *Id.* at 244. The Court in *Wolman* noted that the diagnostician had only limited contact with the child and"[t]he nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student." *Id.* at 244.

A sign language interpreter comes closer to a teacher or counselor in duties, student contact, and educational involvement than a hearing diagnostician since the contact is not time limited but is intimate and ongoing throughout

the school day and school year.[5] Here the services provided in the special education program are not diagnostic. They involve a one-on-one type of relationship concerning educational content, and because the child is mainstreamed into the total curricular and extra-curricular program of the school, the sign language interpreter becomes an integral part of the religious mission of the school.[6] Contrary to the situation where a diagnostician has only limited contact with the child, the sign language interpreter has intimate, ongoing, and continuing contact.

The *Wolman* Court recognized the risk of transmitting ideological views where there is such a close relationship established with the pupil. *Id.* at 247. Here, as even acknowledged by petitioners, there is no question that the sign language interpreter would be transmitting ideological

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[5] In *Wamble v. Bell*, 598 F. Supp. 1356, 1371 (W.D. Mo. 1984), the district court found that "teachers are afforded a unique opportunity to form substantial and endearing relationships with students and to transmit ideological views." This is particularly problematic when the relationship, as here contemplated, is a one-on-one arrangement.

[6] The placement of a sign language interpreter full-time on the premises of a sectarian school stands in stark contrast from the Title I (now Chapter 1) program invalidated in *Aguilar v. Felton*,473 U.S. 402 (1985). In *Aguilar* the Title I personnel had their own separate classroom within the school from which all religious symbols were removed. *Id.* at 407. As Justice O'Connor pointed out in *Aguilar*, Title I personnel

> cannot engage in team teaching or cooperative activities with parochial school teachers, must make sure that all materials and equipment they use are not otherwise used by the parochial school, and must not participate in religious activities in the school or introduce any religious matter into their teaching.

Id. at 428 (O'Connor, J., dissenting). Justice O'Connor also noted that, unlike here where the sign language interpreter would be assigned full-time at the parochial school, in *Aguilar* "78% of Title I instructors . . . visit more than one school each week." *Id.* at 425.

views.[7] And since the individual involved in the transmission of those views is a governmental agent, the imprimatur of the state is impressed upon the arrangement.

Petitioners argue that the sign language interpreter would not be anything other than a transmitter between the sectarian school teacher and the student. Even if this were an important distinction, which we believe it is not, there is no reason why a court should give greater deference to the professional code of a certified signing interpreter than it has to the professional standards of certified teachers. In *Meek v. Pittenger*, 421 U.S. at 369, this Court stated:

> We need not decide whether substantial state expenditures to enrich the curricula of church-related elementary and secondary schools, like the expenditure of state funds to support the basic educational program of those schools, necessarily result in the direct and substantial advancement of religious activity. For decisions of this Court make clear that the District Court erred in relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained.

The *Meek* Court was, as was the court below, concerned with the activity of the state-paid personnel. In *Meek*, the Court, quoting *Lemon*, stated that "[t]he State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion . . . ." *Id.* at 369. It makes

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[7] Petitioners cite Judge Tang, dissenting below who concluded that providing an interpreter was no different than providing a student with eyeglasses or a hearing aid (Petitioners' Brf. at 18). But here the aid is restricted only to sectarian education and worship. The state clearly would not be permitted to provide earphones for the hard of hearing at churches.

little difference whether the individual subsidized by the state is a teacher or an interpreter. What is important from a constitutional view is whether the individual transmitting the religious message is subsidized or paid for by the state.[8]

In *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), this Court stated that its "cases have recognized that the Establishment Clause guards against more than direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs." *Id.* at 389. As this Court stated, "[g]overnment promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines." *Id.* at 389. Action of a school district placing an employee in a pervasively sectarian environment throughout the school day to assist in the transmission of sectarian beliefs may easily be perceived as resulting in a symbolic union. In *Zobrest*, those making the determination that the providing

[8] Little reliance should, in the context of the facts of this case, be placed on *Allen*. As stated in *Wolman v. Walter*, 433 U.S. at 251 n.18, "*Board of Education v. Allen* has remained law, and we now follow as a matter of *stare decisis* the principle that restriction of textbooks to those provided the public schools is sufficient to ensure that the books will not be used for religious purposes. In more recent cases, however, we have declined to extend that presumption of neutrality to other items in the lower school setting. . . . When faced, however, with a choice between extension of the unique presumption created in *Allen* and continued adherence to the principles announced in our subsequent cases, we choose the latter course." Of course, textbooks are not the same as employees. As the Court stated in *Lemon* "[u]nlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church." 403 U.S. at 619. A sign language interpreter is no more subject to book-like examination than a teacher. The Court in *Lemon* did not find professional standards to be a sufficient protection given the prohibition of the First Amendment.

of a sign language interpreter violated the Establishment Clause were presumably reasonable observers. Thus, this Court should be reluctant to overturn the conclusion of both the district court and the court of appeals, which concluded:

> The interpreter would be the instrumentality conveying the religious message and experience. The presence and function of an employee paid by the government in sectarian classes would create the "symbolic union" *Grand Rapids* found impermissible. By placing its employee in the sectarian school to perform this function, the government would create the appearance that it was a "joint sponsor" of the school's activities.

963 F.2d at 1194-95.

Judge Tang correctly observed that "[t]o decide whether the provision of a sign language interpreter would sufficiently enmesh the government in religious matters to offend the Establishment Clause, one must assess carefully the interrelationship of church and state that results when such assistance is provided a student." 963 F.2d at 1202. The court expressed its concern as to supervision by the school district of the interpreter's job performance.

II. Under the Establishment and Free Exercise Clauses of the First Amendment, the aid program demanded by petitioners raises the serious question of whether a pervasively sectarian school will be able to maintain its autonomy by demanding that a state employee observe the school's religiously based rules of conduct while functioning on the religious campus.

There is another entanglement concern with which this amicus curiae has particular concern. If an interpreter's services are requested by a parent and required to be

delivered, what effect does this have on the sectarian school's authority over its student and staff?[9]

Students enrolled in most sectarian schools are subject to specific rules of conduct and are required to attend religion classes and various religious services. For example, most Seventh-day Adventist parochial schools conduct a week of prayer during which students are called upon to commit their lives to the Lord. In addition, both students and staff are required to abide by significant restrictions on conduct and dress while on campus and to participate in the religious activities provided. They may not use tobacco or alcohol products or wear jewelry or immodest apparel while on campus. Could such a sectarian school impose its religious restrictions on a public school employee working on its campus?

If those in charge of a sectarian school should attempt to limit or restrict the dress or activities of the interpreter and the student's parents oppose the sectarian school's position, may the parents require a "due process" hearing conducted by the state or local educational agency under 20 U.S.C. § 1415(b)(2)? Would the "stay-put" proviso of 20 U.S.C. § 1415(e)(3), which provides that during the pendency of any proceeding initiated under EHA, unless the state or local educational agency *and* parents otherwise agree, "the child shall remain in the current educational placement of such child." *See Board of Educ. of City of New York v. Ambach*, 612 F. Supp. 230 (D.C. N.Y. 1985);

[9] In *Bob Jones University v. Johnson*, 396 F. Supp 597 (D. S.C. 1974), the court held that the mere fact that students attending Bob Jones University were receiving federal assistance through the operation of the Veteran's Educational Benefits Act was a sufficient nexus to give the government control over certain aspects of the school's policies, even though it conflicted with the school's free exercise rights. The court in *Bob Jones* stated that "[i]n extending financial assistance, Congress unquestionably has plenary authority to impose such reasonable conditions as the use of granted funds or other assistance as it deems in the public interest." *Id.* at 606.

Carey on Behalf of Carey v. Maine School Administration Dist. No. 17, 754 F. Supp. 906 (D. Me. 1990).

This amicus has an additional concern. Although petitioners to some extent argue only in favor of validating an arrangement by which a school district supplies a sign language interpreter to a deaf student enrolled in a parochial school, their argument seems to be broader than the relief requested. Using *Everson*, petitioners seem to claim that since EHA is a generally available public welfare program for the support of all handicapped children, the services sought may be constitutionally provided.

The limitation of such an interpretation of the Establishment Clause is also contained in the amicus brief of the Christian Legal Society which argues in favor of the constitutionality of any program providing aid to both public and nonpublic school children on a non-discriminatory basis and suggests that this Court adopt a "government neutrality" approach. (Christian Legal Society Amicus Brf. at 18). That amicus contends that "the constitutional inquiry is satisfied *if the state has not favored religion over nonreligion or created incentives for the practice of religion.*" (*Id.*).[10]

Such an approach would "let the genie out of the bottle." *School Dist. of Grand Rapids v. Ball*, 473 U.S. at 397. The nature of such aid would result in substantial moneys flowing from the state to the church with little, if any, guidelines to divide the precincts of the church from that of the state. But, as this Court stated in *Lemon*:

> The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance.

[10] Thus, so long as tax dollars flow equally to public and nonpublic schools, the Establishment Clause is not offended.

403 U.S. at 621.

This concern was addressed in *Lemon v. Kurtzman*, 403 U.S. at 651-52, by Justice Brennan in his concurring opinion:

> Moreover, when a sectarian institution accepts state financial aid it becomes obligated under the Equal Protection Clause of the Fourteenth Amendment not to discriminate in admission policies and faculty selection.

Also, Justice White, in his dissent in *Lemon*, stated that legislation providing assistance to any sectarian school which restricted entry on religious or racial grounds would, to that extent, be unconstitutional. *Id.* at 671 n.2. Justice White said that any government aid to schools which require attendance at instruction in tenets of a particular religious faith would also be unconstitutional. *Id. See also Norwood v. Harrison*, 413 U.S. 455, 464 n.7 (1973).

One commentator, referring to remarks made by Professor Paul A. Freund of Harvard University, observed:

> Moreover, Freund posed an additional constitutional problem confronting such [governmental aid] programs growing out of potential application of the fifth and fourteenth amendments. That is, if a church school receives some public aid, does this not convert it to a publicly-supported institution subject to the same standards and requirements, such as the equal protection clause of the fourteenth amendment, as other public institutions? Freund finally called attention to Justice Brennan's concurring opinion in *Dicenso* [*Lemon v. Kurtzman*] where he stressed that if governmental aid to parochial schools were permitted, "At some point the (church) school becomes public for more purposes than the church would wish." This prompted Justice Brennan to observe, "The church may justifiably feel that its victory on the Establishment Clause has meant abandonment of the Free Exercise Clause."

Boles, *The Burger Court & Parochial Schools: A Study in Law,Politics & Educational Reality*, 9 Val. U.L. Rev. 459, 482 (1975).

Church organizations have over the years united to fight government intrusion into their religious affairs. *See NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). The Seventh Circuit in *Catholic Bishop* observed that an even-handed approach to the First Amendment would seem to suggest that the Religion Clauses, serving as they do as a buckler to prevent financial aid to sectarian schools, should not be any less effective to ward off the inhibiting effect of governmental controls and demands. *Catholic Bishop v. NLRB*, 559 F.2d 1112, 1131 (7th Cir. 1977). This amicus is concerned, however, that should the buckler be removed, there would be no shield inhibiting governmental controls and demands.

The argument is advanced by the Christian Legal Society in its amicus brief that:

> The Free Exercise Clause forbids Congress (and, after incorporation through the Fourteenth Amendment, *any* government) to discriminate against religion. The Establishment Clause has been interpreted to forbid the government to aid or advance religion. In a world in which the government aids or advances many different causes and institutions, this means that the government *must* discriminate against religion in the distribution of benefits. Thus, the Establishment Clause is said to require what the Free Exercise Clause forbids.

(Christian Legal Society Amicus Brf. at 3).

The Christian Legal Society misunderstands the impact of the Religion Clauses of the First Amendment. The Free Exercise Clause and the Establishment Clause are complementary. But if the Free Exercise Clause requires that the state pay for the same services at a sectarian school as the taxpayers provide to a public school, it would swallow up the Establishment Clause.

The Religion Clauses, taken together, have a very specific purpose. As the Court stated in *Lemon*, 403 U.S. at 614, the "objective is to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other."[11]

This Court has declared that it will "not tolerate either governmentally established religion or governmental interference with religion." *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970). In *Walz*, this Court recognized the importance of chartering a judicial course "that preserved the autonomy and freedom of religious bodies while avoiding any resemblance of established religion." It emphasized the necessity of clearly examining governmental actions to see if the government thereby becomes excessively involved in the affairs of the church. *Id.* at 672.

Professor Carl H. Esbeck has written in *Establishment Clause Limits on Governmental Interference With Religious Organizations*, 41 Wash. & Lee L. Rev. 347, 371 (1984):

> As we have seen, however, the principle of separation arose not from the prudential reasoning characteristic of the sociopolitical rationale but from a natural rights view as evidenced in eighteenth century political thought. The natural rights theory argues from higher ground; namely, there are certain inalienable rights which cannot legitimately be denied. *The theory holds that religious organizations are different from other communal societies and that this uniqueness is critical to understanding the First Amendment.* For example, although the Amendment deals only by implication with associational rights, the establishment clause takes specific account of religious organizations through the separation requirement. The separation, of course, is of government and religious organizations, not government and individuals holding religious beliefs (the latter being an impossibility). The place of religious institutions, therefore, has long recognized as a special problem for which the establishment clause makes special provision.

(Emphasis supplied.)

[10] In *Allen v. Morton*, 459 F.2d 65 (D.C. Cir. 1973), the court suggested that government involvement with religion should be kept to a minimum and that not only actual interference, but the "potential for and appearance of interference with religion," should be avoided. *Id.* at 75.

Religious organizations have long claimed the right to discriminate in the hiring and maintaining of their preaching and teaching ministries. They also have long held the view that they must be permitted to discriminate on a religious basis as to membership and enrollment within their institutions. In a case involving the hiring of a minister, the Seventh-day Adventist Church successfully argued this issue before the Fourth Circuit Court of Appeals in *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164 (4th Cir. 1985). The Fourth Circuit stated:

> "As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered 'clergy.' " Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Dis-*

crimination by Religious Organizations, 79 Columbia L. Rev. 1514, 1545 (1979).

Id. at 1169. *See also McClure v. Salvation Army*, 465 F.2d 553 (5th Cir. 1970); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982); *Maguire v. Marquette University*, 627 F. Supp. 1499 (E.D. Wis. 1986), *modified*, 814 F.2d 1213 (7th Cir. 1987); *Miller v. Catholic Diocese of Great Falls*, 728 P.2d 794 (Mont. 1986). But the constitutional exemption from anti-discrimination laws afforded to churches under the Free Exercise Clause has its quid pro quo. As churches are shielded by the Religion Clauses of the First Amendment from government involvement in their sectarian ministries, the Establishment Clause sets churches apart from other private organizations and prevents religious organizations from being the recipients of direct funding by tax-derived funds. The religion and no-establishment parts of the Religion Clauses, thus,are not inconsistent, but complementary.

The Council on Religious Freedom believes that this Court has chartered a course of neutrality between the separate and distinct interests beneficial to both church and state. It views with great concern any shift in the judicial balance that has historically been struck in the sensitive area of the relationship between church and state.

This is certainly not the proper case to reject three decades of this Court's wisdom. The Court should resist the invitation to reject the decisional law of this Court which has prohibited the use of any tax-derived funds when the services provided become an instrument for transmitting sectarian views.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

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Respectfully submitted,

LEE BOOTHBY
(Counsel of Record)
BOOTHBY & YINGST
Suite 201
4545 42nd St., NW
Washington, DC 20016
(202) 363-1773

Attorney for Amicus Curiae Council on Religious Freedom

Of Counsel:

ROBERT W. NIXON
12501 Old Columbia Pike
Silver Spring, MD 20904

WALTER E. CARSON
917 Daleview Drive
Silver Spring, MD 20901

ROLLAND TRUMAN
4522 Greenmeadow Road
Long Beach, CA 90808

HAROLD LANCE
204 N. San Antonio Avenue
Ontario, CA 91762